



NATURAL MINERALS PROCESSING CO.

173 IBLA 304

Decided January 28, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

NATURAL MINERALS PROCESSING CO.

IBLA 2007-2

Decided January 28, 2008

Appeal from a decision of the Las Vegas, Nevada, Field Office, Bureau of Land Management, determining the estimated costs for processing a mineral examination. N-81835.

Set aside and remanded.

1. Fees--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity

Under 43 C.F.R. § 3800.5(b), an applicant for any action for which a mineral validity examination is performed must pay a processing fee for such examination on a case-by-case basis. The case-by-case determination requires BLM to consider what costs will be incurred in performing the examination and to present a cost recovery estimate to the party responsible for payment.

2. Fees--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity

Where a claimant or operator possesses sampling data and analysis pertinent to whether mining claims involve common variety materials and suggests that such data and analysis may reduce the costs of conducting a validity examination, BLM may consider such data and analysis, where appropriate, when estimating the costs of conducting the mineral examination, as outlined in 43 C.F.R. § 3000.11. BLM is not required, prior to commencing the mineral examination, to estimate the cost reduction that may occur during the examination as a result of additional data and analysis not yet supplied by the claimant.

APPEARANCES: Rick Lawton, Esq., Las Vegas, Nevada, for Natural Minerals Processing Company; Christopher J. Morley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M^CDANIEL

Natural Minerals Processing Company (Natural Minerals) has appealed from a September 1, 2006, decision of the Las Vegas Field Office, Bureau of Land Management (BLM), establishing the estimated cost recovery fee for a mineral examination to resolve whether the mineral material may constitute a common variety material.¹ BLM concluded in its decision that it needed to resolve this issue before it could consider Natural Minerals' mining plan of operations, and estimated that the direct and indirect costs of such an examination would be \$300,000. BLM rejected as unsupported Natural Minerals' assertions that this amount was unreasonable, including the claim that BLM failed to consider potential reduction in costs that would result from utilizing data and analyses available from Natural Minerals. On appeal, Natural Minerals renews its assertions that the amount is unreasonable.

Background

In February 2006 Natural Minerals submitted and later amended a plan of operations for proposed activities on 10 mining claims located near Jean, Nevada.² After Natural Minerals provided additional information, BLM concluded that the plan fulfilled the requirements of the surface management regulations at 43 C.F.R. § 3809.401 and that BLM would commence the environmental review process. BLM subsequently issued a decision stating: "As part of the [environmental] review, the BLM has determined that material mined for [use in a commercial fertilizer product] may constitute a common variety material." Apr. 21, 2006, Field Office Decision. BLM cited surface management regulation 43 C.F.R. § 3809.101(a), which states: "On mining claims located on or after July 23, 1955, you must not initiate operations

¹ The decision was also issued to Earthly Mineral Solutions, Inc. (Earthly Minerals), the mining claimant for the 10 claims at issue. Natural Minerals, under an operating agreement with the claimant, is the operator who filed a mining plan of operations, N -81469.

² The 10 claims, NMC 849210, NMC 851467, NMC 869883, NMC 869884, NMC 869885, NMC 869886, NMC 869946, NMC 869947, NMC 869954, and NMC 869955, are within the following townships: T. 24 S., R. 59 E.; T. 25 S., R. 59 E.; and T. 24 S., R. 60 E., Mount Diablo Meridian, Clark County, Nevada.

for minerals that may be ‘common variety’ minerals, as defined in § 3711.1(b) of this title, until BLM has prepared a mineral examination report . . .” *Id.*

On June 27, 2006, BLM notified Natural Minerals (and Earthly Minerals) of estimated fees to be charged for the mineral examination. Noting that its estimate had been developed in accordance with Instruction Memorandum No. 2006-106 (Mar. 13, 2006) (IM), BLM informed Natural Minerals that it expected to incur \$300,000 in costs. BLM provided Natural Minerals a 30-day opportunity to comment on the estimate and explained that a mineral examination would not be initiated until the proper fee was received. BLM further outlined the procedure for commenting, noting that the estimate would be considered final should Natural Minerals and Earthly Minerals elect not to timely respond.

BLM received a letter on July 11, 2006, from Rick Lawton, Director for both Earthly Minerals and Natural Minerals, stating that, contrary to the notice received, BLM had provided no attachment listing the “break-down” of costs. He further asserted that he was familiar with the costs typically associated with a common variety determination, since Natural Minerals had sampled the claims extensively to establish its position that the minerals at issue are not common variety. He stated that Natural Minerals could “mediate many of the costs you anticipate, by presenting the independent reports and tests that were performed for your use.” Lawton then asserted that BLM’s estimate “is unreasonable and not associated with those costs that you will actually incur.”

BLM promptly responded by letter dated July 17, 2006, and provided a copy of the itemized list of estimated costs it had inadvertently failed to attach, with the following remarks:

This is an estimate based on years of BLM experience related to the preparation of these types of examinations *BLM would welcome submissions of independent reports and tests . . . during the process of the examination. If the reports and tests are verifiable, they may reduce the time required to conduct the mineral examination, which could reduce the total cost.*

(Emphasis added.) The record shows that neither Natural Minerals nor Earthly Minerals responded to this comment from BLM by submitting the reports or tests referred to by Earthly Minerals.

Decision and Resulting Issues

In its statement of reasons (SOR), Natural Minerals states that the basis for its appeal is that the cost estimates are clearly unreasonable, as shown by the itemized

list of costs prepared by BLM. Appellant questions why it should pay for the labor of BLM employees when their salaries are paid by the American taxpayer and why it should pay to analyze mineral samples when it has already offered BLM the analysis of 2,200 samples performed by an independent company in the course of submitting a plan of operations for BLM's approval.³

BLM answers that appellant has failed to affirmatively set forth error in BLM's decision. BLM states that it is required under Departmental regulations to recover those costs associated with a common variety determination, including the labor and indirect costs for BLM personnel who perform the associated tasks. BLM also asserts that its estimate of costs is not in error. BLM contends that, in accordance with the guidelines given in the IM regarding case-by-case fee estimates, it has adequately considered and applied the "reasonable factors" outlined therein for such fee estimates. BLM acknowledges that during the mineral examination Earthly Minerals may supply information in its possession, which could reduce the costs, but explains that deciding whether such information will actually reduce costs is premature given the fact that Natural Minerals has not provided additional information it proffered. Answer at 6.

In reply, Natural Minerals explains that it did not examine each area of BLM's cost worksheet because it is available to the Board, but cited two examples that it claims show the unreasonableness of the estimate. It states: "For example, looking to the 'Number of Work Months' in one section we note a total of 10 work months. In another section we note another 8.95 months The time to complete such an evaluation on 186 acres of disturbance is questionable on its face." Reply at 5-6. Appellant further points out that the \$300,000 fee equates to \$1,612 per acre and queries whether that is reasonable. Finally, appellant states that its plan of operations included actual sampling results demonstrating that the mineral material within its mining claims meets the minimum requirements for classification as commercial fertilizer and agricultural minerals. *Id.* at 6. Appellant notes that the company that performed the analysis is at times also employed by BLM for similar work and argues that BLM's insistence on duplicating such effort and the costs associated with it is unreasonable. Reply at 7 n.8. Natural Minerals avers that it offered to provide the samples that were analyzed and the testing data. Reply at 2.

³ Natural Minerals also comments that BLM ignores its request to allow removal of material during the pendency of the mineral examination, provided funds sufficient to cover the value of the removed minerals are placed in escrow. This concern, however, relates to the appeal in IBLA 2006-224, and is not properly before us here.

Discussion

1. The Cost Recovery Procedure

Section 304(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1734(b) (2000), provides:

The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such [public] lands. . . . As used in this section “reasonable costs” include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

Case-by-case recovery of costs associated with mineral examinations was relatively new to the Department in June 2006 when BLM prepared and transmitted its preliminary fee determination. The cost recovery regulations had only been in effect since November 2005 and the IM had only recently been issued in March 2006 and changed in June.⁴

On October 7, 2005, the Department added to its regulations the following final rule imposing new fees to recover BLM’s costs relating to mineral examinations:

An applicant for any action for which a mineral examination, including a validity examination or a common variety determination, and their associated reports, is performed under § 3809.100 or § 3809.101 of this part must pay a processing fee on a case-by-case basis as described in section 3000.11 of this chapter for such examination and report.

⁴ The June IM Change, IM No. 2006-106, Change I, reduced the factor for assessing indirect costs from 19.7 percent in fiscal year 2006, to 19 percent in fiscal year 2007.

43 C.F.R. § 3800.5(b); *see* 70 Fed. Reg. 58854, 58878-79 (Oct. 7, 2005) (effective Nov. 7, 2005). By this rulemaking the Department also established regulations governing when and how BLM estimates fees on fixed-fee or on a case-by-case basis. 43 C.F.R. § 3000.10(a) and (b). 43 C.F.R. § 3000.11(b) governs cost recovery on a case-by-case basis, and provides in pertinent part:

(b) For case-by-case fees, BLM measures the ongoing processing cost for each individual document and considers the factors in Section 304(b) of FLPMA on a case-by-case basis according to the following procedures:

(1) You may ask BLM's approval to do all or part of any study or other activity according to standards BLM specifies, thereby reducing BLM's costs for processing your document.

(2) Before performing any case processing, we will give you a written estimate of the proposed fee for reasonable processing costs after we consider the FLPMA Section 304(b) factors.

(3) You may comment on the proposed fee.

(4) We will then give you the final estimate of the processing fee amount after considering your comments and any BLM-approved work you will do.

(i) If we encounter higher or lower processing costs than anticipated, we will re-estimate our reasonable processing costs following the procedure in paragraphs (b)(1), (b)(2), (b)(3), and (b)(4) of this section

. . . .

(5)(i) We will periodically estimate what our reasonable processing costs will be for a specific period and will bill you for that period. . . .

(ii) If a periodic payment turns out to be more or less than BLM's reasonable processing costs for the period, we will adjust the next billing accordingly or make a refund. . . .

On March 13, 2006, the Associate Director for Minerals, Realty, and Resource Protection, BLM, issued IM 2006-106 to "provide guidance on newly established case-by-case fees to cover BLM's costs of processing documents relating to its solid minerals programs." IM at 1. The IM outlined the procedure for providing a written fee estimate, communicating with the applicant, considering relevant factors, and determining the fee to be applied. Attachments to the IM included the following items: the list of reasonable factors to be considered based on BLM's interpretation of FLPMA section 304(b), cost estimation worksheets, a template for fee estimates to be provided to the applicant, and an outline of procedures for billing and collecting the

fees. One of the completed worksheets attached as an example outlined the costs for a mineral examination. See IM, Att. 3 at 3-1 through 3-7; cf. Att. 2 at 2-38 and 2-39.

2. BLM's Authority To Collect Cost Recovery Fees

[1] We find no merit in appellant's argument that it is unreasonable to recover the cost of time spent for a mineral examination because such employee costs have already been assumed by the U.S. taxpayer. FLPMA authorizes collection of such costs to "reimburse the United States for reasonable costs," including "actual costs." 43 U.S.C. § 1734 (2000). The costs of conducting the mineral examination and preparing the report, including employee time, constitute a direct cost subject to collection. IM at 2. Although the FLPMA reasonableness factors require that BLM adjust its estimate where any of its costs benefit the general public or where the project provides a direct service to the public, Natural Minerals raises no claim to that effect. Thus, it is proper for BLM to recover those costs from the party receiving the benefit of the mineral examination. See *id.*; IM, Att. 1.

3. Cost Recovery Savings That May Occur If BLM Utilizes Information Proffered by the Operator

[2] We agree with BLM that the second issue raised in the SOR is premature, i.e., that BLM is duplicating the cost of sampling analysis by failing to consider cost savings that would result from BLM's utilization of Earthly Mineral's reports or tests.⁵ BLM merely followed its regulatory procedure by preparing a written estimate before conducting the mineral examination. 43 C.F.R. § 3000.11. Although information possessed by the claimant or operator regarding the locatability of the mineral material in question may turn out to be relevant and reduce actual costs, BLM has discretion, pursuant to 43 C.F.R. § 3000.11(b), to determine the need both for obtaining that information and for verifying it. As noted above, should the actual costs encountered be higher or lower than the estimate, BLM will revise its estimate and adjust the periodic billing provided for in 43 C.F.R. § 3000.11(b)(5)(i). Moreover, the regulations call for BLM to refund any money that is not spent on processing costs. 43 C.F.R. § 3000.11(b)(4)(iii). Thus, should BLM find that any of Natural Minerals' data and assistance saves costs in preparing the mineral validity examination, it should adjust the final processing costs accordingly. The fact that it has not done so prior to conducting the mineral examination on the facts presented here is not a basis for reversing BLM's estimate of costs.

⁵ We note that Natural Minerals did not expressly request approval to do work which could reduce BLM processing costs under 43 C.F.R. 3000.11(b)(1). Had BLM received and approved such a request, its final estimate of the processing fee would have been adjusted under 43 C.F.R. 3000.11(b)(4), but such is not the case.

4. *Discrepancies In the Cost Recovery Estimate*

Nonetheless, the Cost Estimation Summary Worksheets prepared by BLM in this case contain sufficient discrepancies that we must set the decision aside. The cost worksheet appears to double-count indirect costs. Indirect costs were calculated on page one of the summary worksheets at 19.7 percent of all costs, as called for in the IM for FY 2006. But, it appears that some indirect costs had already been calculated on pages 2 - 5 of the summary worksheets, which could constitute in part a duplication of indirect costs.⁶ Nothing in the record explains this additional calculation, which suggests the possibility that a mistake was made in the estimate. Finally, we find an additional mathematical error in that the estimate subtotals the amount “2B. Sample Collection, Core/Cuttings Logging” at \$18,991, though the individual amounts listed for this item add up to \$31,482. Cost Estimation Summary Worksheet at 1, 3.

Accordingly, we must set aside BLM’s estimate to the extent the direct and indirect costs of conducting the examination are not supported mathematically in the record. The percentage applied to calculate indirect costs should reflect that called for in the governing IM, as periodically changed.⁷

⁶ On the first page, \$49,342 is added for indirect costs, which represents 19.7 percent of the total of \$250,468 in “direct costs.” However, the \$250,468 in “direct costs” is brought forward from the itemization on the subsequent pages, which appears to have already added indirect costs at rates varying from 5 percent to 10 percent.

⁷ The labor costs calculated by BLM’s Las Vegas Field Office are based on “cost per work month” and “number of work months,” whereas the IM Worksheet is based on “hourly rate” and “No. of Hours.” See, e.g., Cost Estimation Summary Worksheet; IM, Att. 3 at 3-1 through 3.7. The IM specifically states, as it discusses the costs BLM should expect to incur, that “[d]irect costs include labor (*hourly rate according to GS salary schedule*) . . .” IM at 2 (emphasis added). We note some difficulty in verifying the reasonableness of the labor cost estimate since BLM does not explain what amount of labor is represented by a “work month.” *Id.* Considering the applicable IM, the starting point for BLM on remand should be a calculation of labor to be performed using an hourly, rather than a monthly, measure.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed is set aside and the case remanded for action consistent with this opinion.

_____/s/_____
R. Bryan McDaniel
Administrative Judge

I concur:

_____/s/_____
Lisa Hemmer
Administrative Judge